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February 2, 2015

**VIA FEDERAL EXPRESS**

Office of the General Counsel  
Appellate and Supreme Court Litigation  
Attn: Linda Dreeben, Esq.  
National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001

N.L.R.B.  
APPELLATE COURT BRANCH  
2014 FEB -4 AM 11:22  
LITIGATION SERVICES  
WASH. D.C.

**Re: Crew One Productions, Inc. v. National Labor Relations Board, NLRB Case**  
Nos. 10-CA-138169 and 10-RC-124620; U.S. Court of Appeals for the Eleventh  
Circuit Case No. 15-10429-F

Dear Ms. Dreeben:

We represent Crew One Productions, Inc. By this letter, we are serving the National Labor Relations Board with the enclosed file-stamped copy of Crew One's Petition for Review in the above-mentioned matters. We request that the NLRB include in the record on appeal in the Eleventh Circuit the entire record of all in proceedings in NLRB Case Nos. 10-CA-138169 and 10-RC-124620. Please contact me with any questions or concerns.

Sincerely yours,

*Robert F. Parsley / by expressed permission*  
RFP

Robert F. Parsley

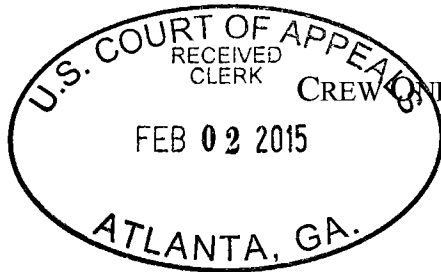
RFP/dac  
Enclosure

cc: Donald J. Aho, Esq. (via email)  
William G. Trumpeter, Esq. (via email)  
Sarah E. Klapman, Esq. (via email)

No. 15-10429-F

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**



CREW ONE PRODUCTIONS, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

U.S. R.B. BRANCH  
APPELLATE COURT  
2014 FEB -4 AM 11:22  
LITIGATION SERVICES  
WASH. D.C.

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On Appeal from the National Labor Relations Board  
Case Nos. 10-CA-138169 & 10-RC-124620

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**PETITION FOR REVIEW OF ORDER OF  
NATIONAL LABOR RELATIONS BOARD**

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*Counsel for Petitioner Crew One Productions, Inc.*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT  
*CREW ONE PRODUCTIONS, INC. v. NLRB*

Under Fed. R. App. P. 26.1 and 11<sup>th</sup> Cir. R. 26.1-1, Petitioner Crew One Productions, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement.

Crew One Productions, Inc. certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party that are known to Crew One Productions, Inc. to have an interest in the outcome of this appeal:

1. Aho, Donald J., counsel for Petitioner
2. Bulls, Mary L., Acting Regional Director, Region 10, National Labor Relations Board
3. Crew One Productions, Inc., Petitioner on appeal
4. Davies, George N., counsel for International Alliance of Theatrical Stage Employees
5. Deitman, Nicole, Field Examiner for National Labor Relations Board, Region 10

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT  
*CREW ONE PRODUCTIONS, INC. v. NLRB*

6. Di Tolla, Daniel, Officer of International Alliance of Theatrical Stage Employees
7. Elliott, III, Jay Y., former counsel for Petitioner
8. Hardison, Todd, representative of Petitioner
9. Harrell, Jr., Claude T., Regional Director, Region 10, National Labor Relations Board
10. Hirozawa, Kent Y., National Labor Relations Board
11. International Alliance of Theatrical Stage Employees, participant in proceedings before National Labor Relations Board
12. Jackson, Jeffry C., Representative of Petitioner
13. Jumper, Ben, Officer of Petitioner
14. Klapman, Sarah E., counsel for Petitioner
15. Local 927 of International Alliance of Theatrical Stage Employees
16. Meyers, Kirsten, Counsel for the General Counsel, Region 10, National Labor Relations Board
17. Miller & Martin, PLLC, counsel for Petitioner
18. Miscimarra, Philip A., National Labor Relations Board
19. National Labor Relations Board, Respondent
20. Parsley, Robert F., counsel for Petitioner

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT  
*CREW ONE PRODUCTIONS, INC. v. NLRB*

21. Pearce, Mark Gaston, National Labor Relations Board
22. Quinn, Connor, Weaver, Davies & Rouco LLP, counsel for  
International Alliance of Theatrical Stage Employees
23. Rich, Lauren, Hearing Officer for National Labor Relations Board,  
Region 10
24. Schiffer, Nancy, National Labor Relations Board
25. Shinnars, Gary, Executive Secretary, National Labor Relations Board
26. Simmons, Scott E., counsel for Petitioner
27. Trumpeter, William G., counsel for Petitioner
28. Warren, Tessa, counsel for International Alliance of Theatrical Stage  
Employees
29. Weaver, Robert M., counsel for International Alliance of Theatrical  
Stage Employees
30. Wilson, Nancy, Acting Regional Director, Region 10, National Labor  
Relations Board
31. Wilson, W. Randall, counsel for Petitioner

Under 29 U.S.C. § 160(f) and Fed. R. App. P. 15(a), Petitioner Crew One Productions, Inc. hereby petitions to the United States Court of Appeals for the Eleventh Circuit for review of the following orders:

(1) the Decision and Order of the National Labor Relations Board in NLRB Case No. 10-CA-138169 entered on January 30, 2015, Ex. A, granting summary judgment in favor of the National Labor Relations Board on the ground that Petitioner Crew One Productions, Inc. refused to bargain;

(2) the Order of the National Labor Relations Board in NLRB Case No. 10-RC-124620 entered on August 21, 2014, Ex. B, declining to review the Regional Director's Decision and Direction of Election entered on April 23, 2014, Ex. C;

(3) the National Labor Relations Board Regional Director's Decision and Direction of Election in NLRB Case No. 10-RC-124620 entered on April 23, 2014, Ex. C, which holds, among other things, that Petitioner is an employer as defined under the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., and that Local 927 of the International Alliance of Theatrical Stage Employees does not have a disqualifying conflict of interest; and

(4) all other rulings and orders in NLRB Case Nos. 10-RC-124620 and 10-CA-138169.

Petitioner Crew One Productions, Inc. requests that the orders in question be modified or set aside. Respondent to this Petition is the National Labor Relations Board.

Respectfully submitted this 2<sup>nd</sup> day of February, 2015.

MILLER & MARTIN PLLC

x Robert Parsley  
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by express  
permission  
TMK

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*Counsel for Petitioner Crew One  
Productions, Inc.*

**CERTIFICATE OF SERVICE AND SERVICE LIST OF PETITION FOR  
ELEVENTH CIRCUIT CLERK OF COURT**

I hereby certify that I have served a copy of the foregoing Petition for Review on each of the following via commercial delivery service or via United States Mail with sufficient postage to ensure delivery:

Tessa A. Warren, Esq.  
Robert M. Weaver, Esq.  
Quinn, Connor, Weaver, Davies & Rouco LLP  
3516 Covington Highway  
Decatur, GA 30032  
*Counsel for International Alliance of Theatrical  
Stage Employees, which participated in agency proceedings*

Mary L. Bulls, Esq.  
Kirsten Meyers, Esq.  
National Labor Relations Board, Region 10  
Harris Tower  
233 Peachtree Street, NE, Suite 1000  
Atlanta, GA 30303  
*Counsel for Respondent National Labor  
Relations Board*

Office of the General Counsel  
Appellate and Supreme Court Litigation  
Attn: Linda Dreeben, Esq.  
National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001  
*Counsel for Respondent National Labor  
Relations Board*



Deputy Associate General Counsel  
of the Appellate Court Branch  
National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001  
*Counsel for Respondent National Labor  
Relations Board*

Under Fed. R. App. P. 15(c), sufficient copies of this Petition have been provided  
to the Eleventh Circuit Clerk of Court to serve the Respondent NLRB.

MILLER & MARTIN PLLC

x Robert Parsley by express  
permission  
TMK

NOTICE. This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Crew One Productions, Inc. and International Alliance of Theatrical Stage Employees.** Case 10–CA–138169

January 30, 2015

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by International Alliance of Theatrical Stage Employees (IATSE or the Union) on October 3, 2014, the General Counsel issued the complaint on October 23, 2014, alleging that Crew One Productions, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 10–RC–124620. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 7, 2014, the General Counsel filed a Motion for Summary Judgment. On November 12, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its position that the petitioned-for unit consists of independent contractors who are not employees within the meaning of Section 2(3) of the Act. In addition, the Respondent contends that the Regional Director and the Board erred in failing to dismiss the representation petition because the hiring hall operated by IATSE Local 927 directly competes with the Respondent as a labor provider in the Atlanta Metropolitan area and that, therefore, IATSE is barred from representing the bargaining unit due to a conflict of interest.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.<sup>1</sup> We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been a Georgia corporation with an office and place of business located in Atlanta, Georgia, where it is engaged in provid-

<sup>1</sup> In its response to the Notice to Show Cause, the Respondent urges the Board to consider "new evidence" that supports the arguments it made in the representation proceeding, reconsider its decision in the representation proceeding, and deny the General Counsel's Motion for Summary Judgment. The alleged "new evidence" that the Respondent seeks to offer includes documents that postdate both the hearing and the Board's Order denying review of the Regional Director's Decision and Direction of Election: (1) a letter from the Georgia Department of Labor dated September 8, 2014, in which an individual in the petitioned-for unit was found to be an independent contractor for the purposes of Georgia's Employment Security Law; and (2) statements from IATSE Local 927's Facebook page celebrating the results of the election. We find no merit in the Respondent's contention. The proffered evidence is not newly discovered and previously unavailable, nor would such evidence, if adduced, establish special circumstances. Newly discovered evidence is evidence in existence at the time of the hearing which could not be discovered by reasonable diligence. *Manhattan Center Studios, Inc.*, 357 NLRB No. 139 (2011), see also *University of Rio Grande*, 325 NLRB 642, 642 (1998) (holding that a post-hearing ruling by the Internal Revenue Service that certain individuals were employees for tax purposes is not "newly discovered" evidence). In addition, in order to warrant a further hearing, the newly discovered evidence must be such that if adduced and credited it would require a different result. See Sec. 102.48(d)(1) of the Board's Rules and Regulations. The proffered evidence concerns facts that were in existence at the time of the representation hearing, and it is offered in support of the same arguments by the Respondent that were fully litigated at the hearing and subsequently rejected. To the extent that the proffered evidence pertains to facts arising after the hearing, it does not constitute newly discovered evidence. *APL Logistics*, 341 NLRB 994, 994 fns. 1 and 2 (2004), enfd. 142 Fed.Appx. 869 (6th Cir. 2005). Further, even assuming that the proffered evidence is newly discovered, the Respondent has failed to show that it would require a different result.

<sup>2</sup> Member Miscimarra would have granted review in the underlying representation proceeding on the independent contractor issue. He agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

ing technical labor staffing, including stagehands for various theatrical and industrial venues.

In conducting its operations during the 12-month period preceding the filing of the charge in this proceeding, the Respondent performed services valued in excess of \$50,000 in states other than the State of Georgia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. The Certification

Following the representation election held by mail ballot and concluded on June 12, 2014, the Union was certified on September 4, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

### B. Refusal to Bargain

By letters dated September 8 and 18, 2014, the Union requested that the Respondent bargain with it as the exclusive collective-bargaining representative of the unit employees and, since about September 23, 2014, the Respondent has refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since about September 23, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce with-

in the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

## ORDER

The National Labor Relations Board orders that the Respondent, Crew One Productions, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Alliance of Theatrical Stage Employees as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Atlanta, Georgia, copies of the attached

notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 30, 2015

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Kent Y. Hirozawa,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Alliance of Theatrical Stage Employees as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

CREW ONE PRODUCTIONS, INC.

The Board's decision can be found at [www.nlr.gov/case/10-CA-138169](http://www.nlr.gov/case/10-CA-138169) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CREW ONE PRODUCTIONS, INC.  
Employer

and

Case 10-RC-124620

INTERNATIONAL ALLIANCE OF  
THEATRICAL STAGE EMPLOYEES  
Petitioner

ORDER

The Employer's and Petitioner's Requests for Review of the Regional Director's Decision and Direction of Election are denied as they raise no substantial issues warranting review.<sup>1</sup>

MARK GASTON PEARCE, CHAIRMAN

PHILIP A. MISCIMARRA, MEMBER

NANCY SCHIFFER, MEMBER

Dated, Washington, D.C., August 21, 2014

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<sup>1</sup> Contrary to our colleague's suggestion, the Regional Director examined both the factors that support and those that detract from independent contractor status. In addition, the Regional Director did evaluate the significance of independent contractor agreements signed by the stagehands. He simply found that their potential significance was undercut by the fact that they apparently were mandated by the Employer.

Unlike his colleagues, Member Miscimarra believes the Regional Director and Crew One have identified substantial questions that warrant granting review on whether stagehands are independent contractors or employees of Crew One. As to this issue, Member Miscimarra notes that the Regional Director determined certain factors favor independent contractor status; regarding certain other factors, the role of Crew One appears to be extremely limited given that most if not all performed work is directed and controlled by third party client(s); and Member Miscimarra believes the Board should determine what weight, if any, shall be afforded to written agreements stating that stagehands would work as independent contractors. Even though such agreements are not necessarily dispositive, it appears that they were afforded no weight in this case, although the Regional Director recognized that a material issue when evaluating employee status is whether, among other things, parties believed they were creating an employee or independent contractor relationship.

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

CREW ONE PRODUCTIONS, INC.<sup>1</sup>

Employer

and

Case 10-RC-124620

INTERNATIONAL ALLIANCE OF  
THEATRICAL STAGE EMPLOYEES

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Pursuant to a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board, during which the parties were given the opportunity to present evidence on the issues raised by the petition and to examine and cross examine witnesses. Both parties filed post hearing briefs which have been duly considered.

In this matter, the Petitioner seeks to represent a unit of all stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events in the

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<sup>1</sup> The Employer's name appears as corrected at the hearing.

Atlanta metropolitan area, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.<sup>2</sup>

### POSITIONS OF THE PARTIES

During the hearing and in their briefs, the parties disagree on the following issues: (1) whether the petitioned-for unit is comprised of employees within the meaning of Section 2(3) of the Act or independent contractors; (2) whether the Petitioner is a business competitor of the Employer, thereby precluding the Petitioner from representing the unit due to a conflict of interest; and (3) the appropriate voter eligibility formula.

In sum, the Employer contends that it only refers independent contractors; that should a finding be made that the referred staffers are employees rather than independent contractors the Petitioner should be disqualified from representing them because it is a business competitor of the Employer; and that the eligibility formula set forth in *Juilliard School*, 208 NLRB 153 (1974), should be utilized if an election is directed.<sup>3</sup>

The Petitioner contends the individuals referred by the Employer are employees, rather than independent contractors; that it is not a competitor of the Employer and therefore suffers no disabling event which would preclude it from representing the unit employees; and that the

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<sup>2</sup> The parties stipulated that the classifications described constitute the appropriate unit should the Regional Director conclude that the unit sought is comprised of employees rather than independent contractors.

<sup>3</sup> Under that standard, an employee is deemed eligible to vote if the employee has worked at least two events for a total of five working days over a one-year period or who have been employed by the Employer for at least 15 days over a two-year period.



appropriate method of determining eligibility of the employees should be at least two events for a minimum of 120 hours in the year preceding the Decision and Direction of Election.<sup>4</sup>

### **REGIONAL DIRECTOR'S FINDINGS**

Having duly considered the evidence and arguments of the parties, I have concluded the petitioned-for unit is comprised of employees rather than independent contractors and that the Petitioner does not have a disabling conflict which would preclude it from representing the Employer's employees. Accordingly, I will direct an election as set forth below.

#### **1. INDEPENDENT CONTRACTOR ISSUE**

The Employer is a Georgia corporation with offices located in Tennessee and Georgia, including an office and place of business located at 763 Trabert Avenue NW, Suite E, Atlanta, Georgia 30318, where it is engaged in providing technical labor staffing, including stagehands for various theatrical and industrial venues.<sup>5</sup> The Employer has been in business since 1992. About 80 percent of the events for which the Employer provides staffing are concerts, plays, and sporting events. The length of the events varies, with most typically lasting one to two days, albeit about 20 events staffed this past year lasted five days or longer. The events staffed by the Employer take place at dozens of venues throughout the Atlanta metropolitan area. In the past year about 85 percent of these events were held at Georgia World Congress Center, Phillips Arena, Georgia Dome, Cobb Galleria, Cobb Energy Performing Arts Center, Verizon Wireless Amphitheatre at Encore Park, Aaron's Amphitheatre at Lakewood, and Gwinnett Arena. The Employer also has contracts, some multi-year, with certain producers and venues to provide labor for their events, including Verizon Wireless Amphitheatre and Aaron's

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<sup>4</sup> During the hearing, the Petitioner asserted that the voter eligibility formula should be based on six events and 120 hours. That position was modified in the Petitioner's brief as set forth herein.

<sup>5</sup> In this matter, the Petitioner seeks to represent only those employees referred by the Employer in the Atlanta metropolitan area.

Amphitheatre. The Employer estimates that it provided labor for about 30 events at Aaron's Amphitheatre, about 30 at Verizon Wireless Amphitheatre, about 50 at Phillips Arena, about 35 at Gwinnett Arena and about 10 at Cobb Energy Performing Arts Center in the last year. Work is available all year round but tends to be greater during the summer months when more venues are operating. About 464 workers were paid at least one dollar by the Employer in 2013.

The Employer maintains a database questionnaire that must be completed by applicants interested in securing work with the Employer. These questionnaires are typically completed online and request information regarding skills, certifications, references, education, age, and availability for work. The applicant is then contacted by the Employer and asked to attend an orientation session for general stage hand labor at the Employer's Atlanta office. During the orientation, the applicants receive a packet, which includes documents such as an IRS Form W-9, directions to various venues, an independent contractor agreement, an additional database questionnaire and a list of Employer policies. These policies provide instructions to the applicants regarding dress codes for events, what to bring to an event, the procedures for accepting and declining work, and protocols for interacting with less-than-pleasant tour personnel. Applicants must complete the Form W-9, the additional database form, and the independent contractor form before they are assigned to an event.

Generally, a potential client contacts the Employer to provide labor for its event. The client notifies the Employer of the number and classification of workers it requires and requests an estimate of costs. The Employer then provides the potential client with an estimate. Once a contract is agreed upon, the Employer selects workers from its database and contacts them, normally via email, to determine whether they wish to work that event. The contacted individuals are free to accept or reject any offer of work.

Those individuals who choose to work an event report to the Employer's project coordinator at the venue at a designated time to check in upon arrival and later to check out when they are notified that their work is completed.<sup>6</sup> The client determines when work is to begin but the Employer requires the workers to report up to 30 minutes before the time designated by the client. The workers also report to the project coordinator if it becomes necessary to leave the job prior to completing their work. The project coordinator normally "departmentalizes" the workers, meaning he assigns them to various work classifications such as lighting, sound, rigging, etc., based on that worker's skill set and experience as set forth in his database questionnaire. They are then assigned by the project coordinator to work under the direction of personnel employed by the client.

All of the workers provide their own basic supplies such as hard hats, steel-toe boots and wrenches, while the riggers also provide their own ropes, harnesses and fall-arresting lanyards. The Employer provides reflective vests with the company name printed on them, which the workers are required to wear while at the venue.

The workers are paid for each job on an hourly basis but are normally guaranteed at least four hours' pay. Overtime rates, and when those rates apply, are negotiated by the client and the Employer.

### **ANALYSIS AND FINDINGS**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The burden of proving independent

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<sup>6</sup> The parties stipulated that project coordinators are excluded from the unit.

contractor status is on the party asserting it. *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004); see generally, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-712 (2001).

Longstanding Supreme Court and Board precedent have established that common-law agency principles apply in distinguishing between employees and independent contractors under the Act. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *Roadway Package System, Inc.*, 326 NLRB 842 (1998). These principles include: (1) the extent of control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the individual is employed; (7) the method of payment, whether by time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. *BKN, Inc.*, 333 NLRB 143, 144 (2001). The Board does not consider this list exclusive or exhaustive, however, and will look at all incidents of the employment relationship. *Arizona Republic*, 349 NLRB 1040, 1042 (2007).

The Board has observed that no one factor is decisive, and the same set of factors that is decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may not be entitled to equal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other. *Roadway Package System, Inc.*, *supra* at 850.

In this case, there is some evidence supportive of independent contractor status. The workers are free to accept or reject offered work without retaliation and are free to accept work from other labor providers. They provide their own basic supplies on the jobs. Taxes are not withheld from their paychecks, and they receive no benefits. Although the Employer provides workers compensation insurance, it is provided at the behest of clients and the associated costs are charged to the client. The Employer mandates that the workers also sign a form designating themselves as independent contractors.

On the other hand, it is clear that the workers perform essential functions of the Employer's operations, inasmuch as the Employer is engaged in the business of providing labor. The workers are normally paid on an hourly basis. Although the Employer asserts that the workers can negotiate their wage rate, there is insufficient evidence in the record to support that assertion. Instead, the record evidence established that the wage rates are unilaterally set by the Employer in advance and those rates are relied upon by the Employer to determine its estimate of labor costs submitted to the client. Although there are a few instances where riggers and camera operators may be paid a daily rate, the record reflects that the daily rate is set by the Employer as well, and, as with workers paid on an hourly basis, there is insufficient evidence of meaningful negotiations between the employer and the workers regarding the daily rates.

While workers are free to accept or reject work, this fact alone does not establish independent contractor status. *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011). Unlike a true independent contractor relationship, once a worker accepts an offer from the Employer, the worker has little, if any, control over when his work hours begins or ends. As stated previously, the workers are hourly paid. The work hours are monitored and maintained by the Employer. Therefore, in addition to being required to check in with the Employer at a time

designated by the Employer, a worker who leaves the job prior to completing his assignment must also notify the Employer.

The Employer contends that the workers and the Employer intend for their relationship to be that of an independent contractor rather than employer/employee. Although the applicants sign independent contractor agreements and taxes are not withheld from their pay, the record reflects that no meaningful number of individuals voluntarily signed the independent contractor agreement. Rather, it appears that they execute the agreement because it is required in order to work for the Employer. Moreover, the Board does not regard as determinative the fact that a written agreement may define a relationship as that of an independent contractor, *Big East Conference*, 282 NLRB 335 (1986); or that an employer fails to withhold standard payroll deductions, *Miller Road Dairy*, 135 NLRB 217, 220 (1962). In addition, although the workers supply their own basic tools, the record reflects that this is common among stagehands and riggers in the industry.

In short, although the record reflects the presence of some factors demonstrating independent contractor status, those factors are insufficient to meet the Employer's burden of establishing such status where, as here, there are other more compelling factors supporting a finding that the workers are employees. *BKN, Inc.*, supra; *Roadway Package Systems, Inc.*, supra. Accordingly, I find that the individuals in the appropriate unit are employees within the meaning of Section 2(3) of the Act.

## **2. BUSINESS COMPETITOR ISSUE**

During the hearing, evidence was presented that IATSE Local 927, a local of the Petitioner, operates a hiring hall which provides labor in the entertainment industry with employers with which it has collective bargaining agreements. Local 927 is signatory to standard

collective bargaining agreements with the Atlanta Ballet, the Atlanta Opera and the Fox Theater. When those employers need employees, they contact Local 927 for referrals. Similarly, employers who are not signatory to an existing agreement that wish to utilize the services of the hiring hall contact Local 927 and enter into a collective bargaining agreement before workers are referred. Agreements lasting less than a year are called "one off contracts." Local 927 does not actively solicit employers to refer employees.

There is no evidence that any of contracts referred to above require employers to pay Local 927 a fee for services rendered. Persons referred are treated as employees of the employer to which they are referred, not of Local 927. Local 927 generates funds to operate its hiring hall by assessing an annual referral fee on non-members and a work fee assessed per event to all individuals, based on the gross wages earned from each job acquired as a result of a referral through the hiring hall. There is no evidence that Local 927 realizes a financial profit from operating its hiring hall.

The Employer and the Petitioner agree that there is some overlap between individuals in the Employer's database and those on the Local 927 hiring hall referral lists. In fact, the Employer encourages its employees to seek work through other labor providers as well as through the Employer.

No evidence was presented as to the business relationship between the Petitioner and Local 927 or whether the Petitioner has any involvement in the operation of the hiring hall by Local 927.

#### ANALYSIS

In order to establish that a union has a conflict of interest sufficient to bar it from representing an employer's employees, the employer must demonstrate a clear and present

danger that the conflict will render the union unable to rigorously represent the employees in the bargaining process. The burden on the party asserting the conflict is a heavy one. *Supershuttle International Denver, Inc.*, 357 NLRB No. 19 (2011).

Initially, I note that it is Local 927, not the Petitioner, that operates a hiring hall. More than a mere affiliation between the Petitioner and Local 927 is necessary to place responsibility of the actions of Local 927 onto the Petitioner. As the Employer has failed to establish that the Petitioner is involved in the operation of the hiring hall or that it controls the operations of Local 927, I find that the Employer has failed to establish the Petitioner, rather than Local 927, may have a potentially disqualifying conflict.

Moreover, assuming for the sake of argument only that Local 927 and the Petitioner are involved in the operation of the hiring hall, I do not find its operation to be a disqualifying event. The Employer's reliance on the cases showing conflict of interest is misplaced as these cases are distinguishable. In *Bausch and Lomb Optical Co.*, 108 NLRB 1555 (1954), the union established and operated a company which directly competed with the Employer. In *Bausch and Lomb*, the Board was concerned that the union would seek to protect and enhance its business interests rather than the interests of the unit employees. In the instant case, however, Local 927 does not operate a business in competition with the employer. Instead, the hiring hall only takes in referral fees on a per capita basis and therefore would only receive money when workers are assigned work by the Employer. It therefore is illogical to believe that the Petitioner would advance positions which negatively impact unit employees being assigned work by the Employer.

*St. John's Hospital*, 264 NLRB 990 (1992) and *Visiting Nurses Assn.*, 188 NLRB 155 (1971), both involve nurse registries operated by unions that were licensed business entities



rather than hiring halls. In *St. John's Hospital*, the registry referred nurses to the employer's hospital and received referrals of patients from the employer. The union exercised complete control over the registry and the employer paid the union for use of the registry's services. The Board found the fact that the employer was a customer of the union created a conflict of interest for the union. The Board also noted in that case that if the union referred nurses only to prospective employers who were signatory to collective bargaining agreements with the union, then the registry may qualify as a hiring hall and would therefore not pose a conflict as found in that case. Here, there is no business relationship between Local 927 and the Employer such as that demonstrated by the facts in *St. John's Hospital*. Further, the Local 927 hiring hall refers individuals only after there is a signed collective bargaining agreement with that production or venue.

Based on the above, the Employer has failed to establish that there is a conflict of interest sufficient to preclude the Petitioner from representing the Employer's employees.

### **3. APPROPRIATE ELIGIBILITY FORMULA**

The Employer and the Petitioner disagree regarding the appropriate voter eligibility formula in this case. The Employer asserts that voting eligibility should be afforded to all employees who have been employed by the Employer during two productions for a total of five working days over a one-year period, or for at least 15 days over a two-year period. *Juilliard School*, 208 NLRB 153 (1974). The Petitioner contends that the proper voter eligibility formula should be applied to all employees who were employed by the Employer during at least two events for a minimum of 120 working hours in the year preceding the date of this Decision similar to the eligibility formula set forth by this Region in its Decision and Direction of Election in *Clear Channel d/b/a Oak Mountain Amphitheatre*, Case 10-RC-15344.

The record reveals that in 2013, the Employer provided labor for about 185 events at larger venues. This number accounted for about 85 percent of the total number of events the Employer worked. Therefore, the Employer provided labor for about 220 events in 2013. There were 544 individuals who worked at least one day for the Employer between March 17, 2013, and March 17, 2014, of whom about 376 worked at least five days for the Employer during that time period. Most events in the past year were one to two days in length, while only about 20 events were five days or longer during that time period. During the days of their assignments, about two-thirds of the riggers complete their tasks within four hours at a typical event, whereas most stagehands work over 4 hours, at least on the larger events.

#### ANALYSIS

In devising eligibility formulas to fit the unique conditions of a specific industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). In the different areas of the entertainment industry, the Board has been flexible in devising eligibility formulas, in recognition of the fact that employees are frequently hired on a day-by-day or production-by-production basis. *DIC Entertainment, L.P.*, 328 NLRB 660 (1999). In doing so, the Board stated that it is its responsibility to devise an eligibility formula that is "compatible with our obligation to tailor our general eligibility formulas to the particular facts of the case." *American Zoetrope*, supra. Thus, in *Medion, Inc.*, 200 NLRB 1013 (1972), employees who were employed on at least two productions for a minimum of 5 working days in the year preceding the issuance of the Decision were deemed eligible to vote. In *American*

*Zoetrope*, the Board eliminated the 5-day requirement on a showing that, unlike in *Medion*, most unit jobs lasted only 1 or 2 days.

In *Clear Channel d/b/a Oak Mountain Amphitheater*, cited by the Employer, the Board granted review of a regional director's Decision in which he applied a variant of the *Medion* formula to a unit of stage hands and related employees similar to the unit at issue here. The Board invited briefs addressing whether the Board should reconsider the entertainment eligibility formulas set forth in *Medion*, *American Zoetrope*, and related cases. The Board determined it was "unnecessary to reevaluate the eligibility formulas in this industry" and decided the case based on existing precedent. *Oak Mountain*, supra, slip op. at 4. The Board found that the employer's shows lasted only one to three days, with the majority lasting only one day. The Board determined that an employee successfully completing two projects for the employer was a more significant indication of future employment than the total number of hours worked. Thus, the Board eliminated the hours of work requirement found by the regional director and held that the *American Zoetrope* standard of two shows in the year prior to the issuance of the Decision and Direction of Election applied.

In light of the above, I find that a unit eligibility formula based on the number of days assigned to those on the referral list rather than hours of work is the most significant indication of future employment with the Employer. However, given the large number of work opportunities available to employees in the instant matter, I believe that to eliminate casual employees from those truly interested in continued employment with the Employer, the eligibility formula should be modified slightly to include at least two events or five work days,

regardless of length of those days, during the year preceding issuance of this Decision and Direction of Election. This formula would enfranchise approximately 376 employees.<sup>7</sup>

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. As stipulated by the parties, the Employer is engaged in commerce within the meaning of the Act. Accordingly, it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

"All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

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<sup>7</sup> The 120 hour requirement as proposed by the Petitioner would reduce the unit size to approximately 221 employees.

### DIRECTION OF ELECTION

Inasmuch as the employees are scattered throughout the Atlanta metropolitan area and do not regularly report to a location of work under the control of the Employer, a manual election is not feasible in this matter. Accordingly, the National Labor Relations Board will conduct a secret-ballot election by mail among the employees in the unit found appropriate above. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Alliance of Theatrical Stage Employees. The date, time, and place of the mail ballot election will be specified in the Notice of Election that will issue subsequent to this Decision.

#### A. Voting Eligibility

Eligible to vote are those in the all unit employees who were employed by the Employer on at least two events or five work days, regardless of length of those days, during the year preceding issuance of this Decision and Direction of Election and who were not terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Ineligible to vote are employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

## B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the National Labor Relations Board Atlanta Regional Office, 233 Peachtree Street, NE, Harris Tower, Suite 1000, Atlanta, Georgia 30303-1531, on or before **April 30, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, [www.nlr.gov](http://www.nlr.gov), by mail, by hand or courier delivery, or by facsimile transmission at (404) 331-2858. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending

list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

#### C. Notice Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 full working days prior to 12:01 am of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. The term "working day" shall mean the entire 24-hour period excluding Saturday, Sundays and holidays. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by 5:00 P.M., (EDT) on May 7, 2014. The request may be

filed electronically through E-Gov on the Board's web site, [www.nlr.gov](http://www.nlr.gov),<sup>8</sup> but may not be filed by facsimile.

DATED this 23rd day of April 2014, at Atlanta, Georgia.



A handwritten signature in black ink, reading "Claude T. Harrell Jr." The signature is written in a cursive style.

Claude T. Harrell Jr., Regional Director  
Region 10  
National Labor Relations Board  
233 Peachtree Street, NE  
Harris Tower, Suite 1000  
Atlanta, Georgia 30313-1531

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<sup>8</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, [www.nlr.gov](http://www.nlr.gov).